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DIVORCE LAW REFORM

ACSW RECOMMENDATIONS

22 SEPTEMBER 1976

(VERSION FRANÇAISE DISPONIBLE)



**Canadian Advisory Council
on the Status of Women**

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**Conseil consultatif canadien
de la situation de la femme**

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DIVORCE LAW REFORM

With the rendering of the supreme court decision in the Murdoch case in 1973, following closely the report of the Royal Commission on the Status of Women, a new realization of the inequities and injustices in Canadian law relating to marriage and divorce surfaced in Canada. Provincial and federal governments established law reform commissions to examine among other things the whole area of family law, and to recommend amendments that ensure the rights of partners and recognize their responsibilities during the marriage and in the case of breakdown.

The Advisory Council on the Status of Women has recommended (April 1974, June 1974, October 1975, January 1976) that an integrated family court system be established in Canada to exercise a comprehensive and integrated jurisdiction over all matrimonial and family proceedings including divorce, judicial separation, maintenance, and the division of matrimonial property. (Annex A)

In May 1976, the ACSW endorsed a standard encompassing the principles of partnership, upon which it believes legislation relating to the recognition and protection of the rights of men and women in marriage should be based. (Annex B)

Having agreed upon the need for a unified family court system, and having clearly stated its definition of equity in marriage, the ACSW undertook a study of the existing divorce laws. After careful consideration of the present laws, the ACSW believes that the only acceptable long-range goal is a family law package which must include new laws surrounding marital property, divorce, maintenance, marriage counselling, child guardianship and support, and

family courts. Taking into account the repercussions of divorce laws in other areas of matrimonial and family law, the ACSW has agreed to 1) endorse a number of principles in relation to long-range divorce reforms, and 2) make recommendations to the government for interim divorce law reform.

PRINCIPLES FOR LONG-RANGE REFORMS

The ACSW has not attempted to write a new Divorce Act. Instead, it has established principles which should be incorporated into the new law. It believes that these principles place marriage and divorce in a realistic perspective in relation to Canadian society, and that they ensure equality between the spouses in cases of marriage breakdown.

The adopted principles are:

- 1) Laws relating to marriage and divorce should be based on the concept of the equality of the spouses in relation to each other.
- 2) The right to be married should be accompanied by the right to stop being married. The divorce process should be humane, simple and inexpensive.
- 3) The purpose of laws relating to divorce should be to mitigate the damaging psychological and economic consequences of marital breakdown. Support services should be available to the individuals whose marriage is being dissolved.

4) Marriage breakdown should be the only criterion for divorce. The parties to a marriage are best able to determine when that marriage is no longer viable.

5) Provided that basic provisions have been made for adequate child care and property settlement, proceedings for divorce by mutual consent and divorce on the application of one of the spouses could be instituted, with no other requirements.

6) The concept of fault should not affect the economic consequences of divorce.

7) Property settlements should be made on the basis of equal partnership in marriage, and maintenance settlements should promote rehabilitation and be based on needs and financial abilities.

8) The emotional, physical and economic interests of children must be protected in the divorce process.

9) The courts should have the power to order that the children be represented by independent counsel in divorce proceedings; where the issue of custody is contested, the children must be represented by independent counsel.

The changes being suggested by these recommendations are wide-ranging, both in philosophy and in law. Such changes can be undertaken with commitment and cooperation between the federal and provincial governments and the public. In the meantime, interim reforms can be enacted to be consistent with the above principles.

INTERIM REFORM

The following reforms in divorce law are recommended to the federal government for immediate enactment. These reforms require no inter-governmental negotiations and should be implemented at the earliest possible time.

- 1) Marriage breakdown shall be the sole criterion for divorce.
- 2) Marriage breakdown shall be conclusively established by;
living apart (a) one year separation of the spouses,
or
living together (b) a one year waiting period following
the application for divorce by
either spouse.
- 3) Where both spouses jointly request or consent to divorce and where there are no dependent children, and no maintenance or property requests, and where the court is satisfied that there is no possibility of reconciliation, no separation or waiting period will apply.
- 4) No divorce shall be granted until the court is satisfied that:
 - (a) the parties have reached an equitable property settlement,
 - (b) adequate maintenance, based on needs and financial abilities, is provided for the spouse and children, and
 - (c) satisfactory arrangements are made for the emotional and physical development of the children.

5) The courts shall be empowered to index to the cost of living, maintenance awarded on divorce to the spouse and/or children.

ANNEX A

RECOMMENDATIONS OF THE ADVISORY COUNCIL ON THE STATUS OF WOMEN RELATING TO UNIFIED FAMILY COURT

January 1975

- A) That the principle of a unified Family Court be accepted;
- B) That offences by and cases against juveniles be heard in the unified Family Court;
- C) That the federal and provincial governments co-operate in the development of the unified Family Courts and reach agreement on the delegation of authority, and jointly provide the necessary funding;
- D) That judges of the unified Family Court be federally appointed and be specially trained in family law;
- E) That Family Court considerations be closed to the general public except when unanimous consent of parties concerned is given to the contrary. Nevertheless, in all cases, except when the judge orders otherwise for reasons of public policy, the press and interested public bodies, such as welfare organizations and Civil Liberties associations, should be permitted to be present subject to a prohibition against publication of names, addresses or other identification of persons concerned; and
- F) That well-qualified professional support staff be available to work in co-operation with the Family Court judges.

October 1974

ACSW reiterated its strong support of the concept of an integrated family court system, with appropriate services, and urged the early implementation of such a system.

June 1974

- A) That the multidisciplinary approach suggested by the Law Reform Commission be utilized;
- B) That the physical surroundings of the Family Court be such as to create an atmosphere of confidence for children as well as adults;
- C) That the press not be allowed to be present during Family Court hearings;
- D) That the adversary system in current use not be carried forward into the proposed Family Court system. The new system should avoid building up conflict of loyalty in children;
- E) That a Maintenance Award Fund be established into which payments ordered for the support of an estranged family would be made and out of which such payments to the family would be drawn;
- F) That the Family Court system include provisions for special support that would enable the spouse who has been out of the labour force, to work towards becoming economically independent;
- G) That, where they exist, juvenile courts should become a part of the new Family Court System; where they do not exist, juveniles should be dealt with in the family court;

H) That Family Court judges be given tenure but that the reasons for loss of tenure be broadened to include bias displayed which creates a loss of confidence of equitable treatment being obtained, and that the assessment of a judge's competence to continue on a Family Court bench be subject to review by a panel of his/her peers and a representative of the public on request;

I) That in all Family Courts there be an equal proportion of women in the judiciary and in all professional, technical and support positions; and

J) That the position of Family Court judge is of such importance that there must be cooperative appointments mutually agreed upon by federal and provincial authorities.

April 1974

ACSW recommended that family courts be given the opportunity to exercise a comprehensive and integrated jurisdiction over all matrimonial and family proceedings including divorce, judicial separation, alimony, and the division of matrimonial property.

ANNEX B

A STATEMENT OF THE RECOGNITION AND PROTECTION OF THE RIGHTS OF MEN AND WOMEN IN MARRIAGE

Considering that the people of the United Nations affirm their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women (United Nations Charter);

Considering that the Universal Declaration of Human Rights asserts the principle of non-discrimination and proclaims that men and women are entitled to equal rights as to marriage, during marriage and at its termination, and that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state (Universal Declaration of Human Rights, Article 16);

Considering that the Canadian Government has undertaken to uphold the standards established in the United Nations Charter and the Universal Declaration of Human Rights;

Considering that the Canadian Bill of Rights affirms the dignity and worth of the human person and the position of the family in a society of free persons and free institutions (Canadian Bill of Rights, Preamble);

Bearing in mind the great contribution made by women to social, political, economic and cultural life and the part they play in the family and particularly in the rearing of children;

Recognizing that current Canadian laws with reference to the rights of women in marriage are in direct conflict with the principle of equality of men and women, do not take account of the family as the fundamental group unit of society, do not recognize women's full services and talents are engaged along with those of men in the full and complete development of the family and society, and therefore are unjust and constitute an offence against human dignity and the family;

We therefore declare that laws relating to women and men in marriage shall incorporate the principles of equality between spouses and marriage as an interdependent partnership of shared responsibilities.

Such Legislation will reflect:

1. The concept of marriage as an economic and social partnership of legal equals.
2. The family as the fundamental group unit of the economy and the recognition of unpaid work within the family as being as vital to the unit and to society as paid work performed outside the family.
3. During the currency of the marriage the right of the partners to an equal on-going share of security being built up for the future (such as an on-going split of pensions and superannuation credits and tax free savings).
4. During the currency of the marriage the responsibility of the partners to support one another with services and/or finances to reflect the concept of marriage as an interdependent partnership of shared responsibilities.
5. At the dissolution of the marriage for whatever cause, the right of the partners to an equal share of the assets accumulated during the period of the marriage and their right to the protection of those assets from undue alienation during marriage.

The adequacy of laws relating to the rights and responsibilities of men and women in marriage shall be assessed according to the standard established herein.

Legislation working towards the standard contained herein shall be introduced immediately. A technique for ensuring economic equality during the currency of the marriage has not yet evolved, but this must not prevent immediate reform to grant equality to men and women at the dissolution of the marriage, or the division of security in the form of pensions and tax free savings during the marriage.

Advisory Council on the Status of Women
June, 1975

The concept of "economic and social partnership" of the spouses must encompass the following standards:

1. Each person has a right to know what she/he is contracting into as well as its consequences during the marriage and in the event of its termination;

This principle has a two-fold implication. The first is that spouses should be as well informed as possible of their rights and obligations on marriage. This could be achieved through a public information programme directed at the young, possibly at the secondary school level.

Secondly, this principle requires that each spouse's rights and obligations be clear and predictable at the time of marriage, whatever their matrimonial regime.

2. Couples should have the right to contract out of any fixed statutory matrimonial regime with a formal written agreement, after independent legal advice to each of the parties;

This principle is based on the premise that couples can decide what matrimonial regime is most suited to their convictions and circumstances. It can also imply that spouses may jointly decide to alter their matrimonial regime during the course of the marriage.

3. Notwithstanding the preceding principle, each spouse should have a right to some minimum guarantees ensuing from the marriage;

Exceptional and over-riding measures should apply to all spouses, whatever their matrimonial regime, with respect to family assets such as the home and its contents, as well as to pension credits and tax-free savings accumulated during the marriage. The home and its contents should be the joint property of the spouses from the time of their acquisition, while pension credits and tax-free savings would be split between the spouses if and when dissolution of the marriage occurs.

4. Direct involvement by the state in the mutual marital arrangements agreed upon by two partners should take place only to protect the integrity of individuals and marriage as an institution;

5. Both spouses should be free to make living and financial arrangements according to their joint priorities, circumstances and interests, rather than according to traditional preconceptions of the sexually-determined roles of each spouse. The support obligations between spouses should be mutual;
6. The welfare of children is a public as well as private matter. The state, as well as the parents, must assume responsibility for the protection, care and well-being of dependent children.

The state, with its primary interest in the welfare of the children, must assume part of the burden of parents with dependent children. More particularly, the state should give adequate financial support to parents in need and should assume the support and funding of day-care for children.

7. The contribution of a spouse who chooses, in consultation with the other spouse, to work within the home rather than in the paid labour force (as presently defined) must be recognized as an equal contribution to the marriage partnership.

Advisory Council on the Status of Women
May, 1976

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